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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 432

JAMES R. HOFFA, LARRY CAMPBELL, THOMAS EWING PARKS, and EWING KING, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY BRIEF FOR PETITIONERS

ARGUMENT

INTRODUCTION

The Government's Brief in Opposition is seriously misleading as to the facts of record in that it seeks to minimize the intrusion of Vick, Sheridan, and the FBI into the defense councils of Petitioners; and to justify that intrusion as a search for "illegal activities."

This reply will be limited to an attempt to refocus the facts and law as they relevantly are with respect to the first Reason for Granting the Writ; and briefly to discuss whether the two constitutional questions were required to be raised before the trial court on newly discovered evidence, and if so, whether they were so raised.

1. Deprivation of Fair Trial—By Secret Government Intrusion Upon Petitioners' Right to Effective Assistance of Counsel in Preparing Their Defense.

The Government seeks to impute early knowledge of the Petitioners of Vick's role as a spy, because Osborn knew of Vick's association with Sheridan in August 1963 (Opp. 6).[1] True, but what was that association? Vick told Osborn that "he was under pressure from Walter Sheridan * * * that he do no further work for me" (D.A. 8a).[2]

The fact that Osborn knew that Vick was under pressure from Sheridan that "he do no further work for me" is quite a different thing than knowing that Vick was a spy and had been a spy for the FBI and Walter Sheridan to obtain and disclose to the Government the strategy and activities of petitioner's counsel.

Had Osborn known that, he would certainly not have continued to employ Vick so that he could keep on reporting Osborn's activities and the activities of witnesses and other investigators as he did on August 21, 1963, August 23, 1963, September 5, 1963, and September 6, 1963, and he most certainly would not have reemployed Vick on October 28, 1963 (D.A. 8a) which resulted in Osborn's indictment and conviction.

It is uncontradicted that Osborn did not know until May 26, 1964, that Vick was reporting from January to October 28, 1963 to the FBI and Sheridan all of his activities on behalf of Petitioner; and Osborn did not disclose it to Hoffa's then attorneys until November, 1964.

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[1] "Opp." references are to the Government's Brief in Opposition.

[2] "D.A." references are to petitioners joint appendix printed for the Court of Appeals.

The only reasonable interpretation of Vick's statement to Osborn is that it was a calculated effort by Vick and Sheridan to lull Osborn into believing that Vick was trustworthy, resisted pressure, and thus to enable Vick to continue his role as a double agent.

Also, the Government seeks to impute knowledge of Petitioners as early as November, 1963 of Vick's role as a spy. (Opp. 5, 6, 7). The Government fails to point out a single fact in the Vick affidavit as to Osborn's activities after October 28, 1963, or in the tape recording of Vick's conversation with Osborn of November 11, 1963,[3] which would lead anyone to believe that Vick had been a spy for the Government from January, 1963 to October, 1963. Such disclosures by Vick made subsequent to October 28, 1963, if true, were clearly illegal and not protected by any privilege.

It is not disputed that Petitioners had knowledge of some of Vick's activities, namely, that Vick reported Osborn's alleged illegal activities after October 28, 1963, but there was no evidence before the court below and the Government fails to show any evidentiary basis for a conclusion that Petitioners knew of Vick's activities from January, 1963 to October 28, 1963, relating to the Petitioners' trial preparation.

If indeed Vick's activities after October 28, 1963 did uncover evidence of illegal actions by Osborn, it would not justify the antecedent intrusion into defense councils any more than discovery of the fruits of a crime can justify an illegal search and seizure.

The footnote in the Government's brief at page 9 referring to information given Sheridan by Vick as

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[3] It was the conversations Vick had with Osborn after October 28, 1963 which led to Osborn's conviction for obstruction of justice in May, 1964. See *Osborn* v. *United States*, 385 U.S. 323.

to "approaches allegedly used" to tamper with the 1962 Test Fleet jury deserves a passing comment.

If these allegations of Vick were true, why did he not report them to the FBI in the reports starting in January, 1963 (D.A. 66a, 67a, 47a, 55a)? Not a word was said to the FBI about such approaches.

Vick waited until August 21, 1963, to give this information to Sheridan (page one of the notes attached to D.A. 15a) (D.A. 85a-86a).

Something had happened to the informer Vick between June, 1963, and August 21, 1963.

Vick had lost his job and he had gotten another job with Sheridan's help (Opp. 192a, 215a, 216a, 221a, 224a).[4] And, like the typical informer, undertook to show his zeal, and to prove to Sheridan that he had made a good deal.

Significantly not a single affidavit of Vick's nor the FBI agents involved was filed by the Government. Here, Vick was the key person to disprove, if possible, the appellants' allegations; but for undisclosed reasons the prosecution has preferred that he and the FBI agents remain silent.

Also, the only person who knows all the information he obtained from Osborn's office of defense planning, statements of witnesses, and defense strategy, is Vick; and only he knows whether Sheridan has made a full and complete disclosure of Vick's activities. The Government has preferred that he remain silent.

Only Osborn, his aides and the interested defense attorneys knew what the defense to the Tippens count

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[4] The appendix references preceded by the letter "O" refer to the Appendix in *Osborn* v. *United States*, Case No. 16056 in the Court of Appeals.

was going to be. The defense was that Tippens wanted to get off the jury and for that reason he reported the alleged approach to him. This was known only to defense counsel, and Sheridan received the exact information from Vick (D.A. 9a-10a, 86a).

Nor is the record clear, as contended by the Government, that the FBI neither sought nor received information from Vick as to defense strategy (Opp. 7). If anything, the record is clear that Sheridan and the FBI did exactly that.

The acts of solicitation and intrusion are set out in detail (Pet. pp. 3 to 21), and need no repetition.

Osborn has stated and it is uncontradicted that he communicated matters relating to the defense to Petitioner Hoffa and the attorneys for other Petitioners (D.A. 6a) and those defense plans appear in the FBI and Sheridan notes, which are the prosecution's own records.

In addition, the FBI's own records of what Vick reported to them, plus Vick's admissions that he made the reports, plus Sheridan's own admission that he got Vick "to represent me," plus the solicitation of Vick by agent Hillen, justify a conclusion that Vick was the spy of the FBI and Sheridan in the councils of Petitioners.

The Government contends that Sheridan was only interested in "illegal" activity which Vick might observe (Opp. 8). Therefore, the conclusion is that what Sheridan did was justified. "Illegal" activities can be thwarted without Sixth Amendment violations. There are few cases in which those concerned with law enforcement do not believe their unconstitutional activities are reasonable in relation to one or more of

their duties; but the relevant question is whether the Government has violated the prohibition of the Constitution.

Assuming, without conceding that Vick was in Osborn's office to ferret out only "illegal" activities, it should avail the Government nothing. The Sixth Amendment is violated by the Government's very presence in the protected consultations of the defense, whether or not any defense information was passed to the Government. This is well settled by *Glasser* v. *United States,* 315 U.S. 60, 76; *Caldwell* v. *United States,* 205 F.2d 879 (C.A.D.C.) and *Coplon* v. *United States,* 191 F.2d 749 (C.A.D.C.).

2. The Applicability of United States v. Johnson.

The Government relies upon *United States* v. *Johnson,* 327 U.S. 106 as justifying denial of the motion. This Court has ruled that that case is limited in application to "the ordinary defense motion for new trial" on newly discovered evidence, i.e., a motion based on new evidence in conflict with the trial testimony (see *Mesarosh* v. *United States,* 352 U.S. 1 at 12, fn. 6, 7).

The *Johnson* case would seem to have no application to a motion for a new trial predicated on constitutional grounds, as in this case. The Johnson case arose on affidavits, without any oral hearing, and this Court emphasized that the trial judge, in view of his conduct of the original trial, "was exceptionally qualified to pass on the affidavits" (327 U.S. at 112). In contrast, the matters here at issue were not before the trial judge at all on the original trial. The issues appellants raise here as distinguished from those in *Johnson*—bear directly on constitutional rights under the Fifth and Sixth Amendments.

The Court below approved the action of the District Court in disposing of the allegations of the motion without a hearing.

In numerous post-conviction applications for relief in habeas corpus and § 2255 matters this Court has admonished repeatedly against disposing of factual assertions regarding constitutional wrongs without an evidentiary hearing. *Walker* v. *Johnson,* 312 U.S. 275; *Machibroda* v. *United States,* 368 U.S. 487, 495.

Had petitioners chosen to present identical charges in a Sec. 2255 petition, filed after incarceration, they would have been entitled to an evidentiary hearing. It is an anomaly that they were denied a hearing on the motion for a new trial.

The Government contends lack of diligence by the petitioners in discovering the intrusion and the suppression of evidence. Because there is no general discovery process available in a criminal case, defense counsel sought to discover intrusion into their councils by cross-examination of Government witnesses but were thwarted by Government objections (Pet. 20). Simpson's testimony was also suppressed (Pet. 21).

To deny relief to the Petitioners because they were not alert enough to discover that their Government had violated their constitutional rights would be only to reward Government agents who trample on those rights.

This Court has said in *Sanders* v. *United States,* 373 U.S. 1:

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." 373 U.S. at p. 8.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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